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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

vs.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

vs.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY,

Appellee

STATEMENT OF APPELLEE MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION, INCLUDING APPELLEE'S MOTION TO DISMISS OR AFFIRM THE APPEAL

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, its statement in opposition to appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal on the ground of lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey on the ground that the questions raised by the appellant are so unsubstantial as not to need further argument.

This cause appears to be reviewable by the Supreme Court on direct appeal from the Supreme Court of New Jersey. Appellee asserts, however, that jurisdiction is lacking under the statute and in addition the unsubstantial character of the grounds stated by appellant are so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters relied upon by appellee are more particularly stated below:

1. Matters and Grounds Making Against Jurisdiction

The appellee, State Board of Registration and Examination in Dentistry of New Jersey, served on appellant, Sydney A. Taber, on May 15, 1946, a notice of hearing for revocation or suspension of his license to practice dentistry. (R. pp. 5-7). Said notice of hearing stated that the appellant had violated Section 45:6-7(h) of Title 45 of the Revised Statutes of New Jersey on the following grounds:

> That appellant had been employed by an unlicensed manager, proprietor, operator and conductor as defined in Section 45: 6-19 of Title 45 of the Revised Statutes of New Jersey;
>
> That the appellant had entered into possession of such dental material and equipment as is necessary for the management of a dental office which is owned by such unlicensed manager, proprietor, operator and conductor on the basis of a lease and other agreement for compensation for the use of such material, equipment and office; and
>
> That the appellant had entered into an arrangement by which there was made available to him, for his use, dental material, equipment, and office, the ownership and control of which was retained by such unlicensed manager, proprietor, operator and conductor, etc.

The notice of hearing is couched in the language of the statute.

The statutes involved in this cause are section 45:6-7(h) and section 45:6-19 of Title 45 of the Revised Statutes of New Jersey (NJSA 45:6-7(h) and 45:6-19).

Section 45:6-7(h) reads as follows:

> "Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfaction that the licensee: * * *"
>
> "h. Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19 of this Title or has entered into possession of such dental material or equipment, as may be necessary for the management of a dental office which is owned by any such unlicensed manager, proprietor, operator or conductor on the basis of a lease or other agreement for compensation for the use of such material, equipment or office or has entered into any arrangement by which there is made available to him, for his use, dental material, equipment or office, the ownership or control of which is retained by any such unlicensed manager, proprietor, operator or conductor, except where the transaction is a bona fide sale of dental material or equipment secured by chattel mortgage or conditional sale agreement."

Section 45:6-19 reads as follows:

> "The terms manager, proprietor, operator or conductor as used in this chapter shall be deemed to include any person who
>
> (1) Employs operators or assistants; or
>
> (2) Places in the possession of any operator, assistant, or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or office; or;
>
> (3) Retains the ownership or control of dental material, equipment or office and makes the same available

in any manner for the use by operators, assistants or other agents; provided, however, that the above shall not apply to bona fide sales of dental material or equipment secured by chattel mortgage."

A hearing was held, at which evidence was introduced showing the appellant's employment by David Locks, an unlicensed person, Dental Acceptance Co., Gennessee Dental Supply Co., two trade names under which said David Locks traded; Arday Inc. and Arnold Park, Inc., two corporations of which said David Locks was president.

On July 27, 1946, the State Board of Registration and Examination in Dentistry of New Jersey adopted a resolution in which the Board found appellant guilty of violating said Section 45:6-7(h) by being so employed and ordered his dental license suspended for a period of six months (R. pp. 317-319).

A writ of certiorari was taken to the (former) New Jersey Supreme Court to review the action of the Dental Board. In the Reasons for Reversal (R. pp. 3-4) filed by appellant in certiorari, the only objection as to constitutionality was made to that portion of the quoted statute (R.S. 45:6-7(h)) which dealt with the leasing of equipment for dental purposes. No constitutional objection was raised as to the first portion of the quoted statute which inhibits the employment of licensed dentists by an unlicensed manager, proprietor, operator or conductor of a dental office.

On February 18, 1947, that court, on writ of certiorari, filed its opinion which held that subdivision (h) of Section 45:6-7 was unconstitutional upon the ground that it was a violation of the constitutional right to be free of arbitrary interference with a lawful calling. The opinion is reported in 135 N.J.L. 255; 51 Atl. (2d) 250 (R. pp. 321-322). It will be noted that this opinion addresses itself solely to the latter clauses of the statute in dispute. It did not concern itself or decide the constitutionality of the first portion of the

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statute in question (R.S. 45:6-7(h)) which prohibited employment of a licensed dentist by an unlicensed manager, proprietor, operator or conductor of a dental office.

The conviction and suspension of the appellant by the State Board of Registration and Examination in Dentistry of New Jersey was reversed and set aside pursuant to this opinion in a Rule for Reversal filed February 26, 1947.

On September 26, 1947, a notice of appeal from this decision and judgment to the Court of Errors and Appeals, the court of last resort in all causes in New Jersey, was filed (R., p. 324). The New Jersey Court of Errors and Appeals in an opinion filed on May 13, 1948, and reported in 137 N.J.L. 161, 59 Atl. (2d) 231, reversed the New Jersey Supreme Court and held constitutional so much of said Section 45:6-7(h) of the Revised Statutes as reads as follows:

> "h. Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in Section 45:6-19 of this Title * * *".

It is important to note that the constitutionality of the other two clauses was not decided and therefore are still declared to be unconstitutional under the original decision of the (former) New Jersey Supreme Court in certiorari.

The Court of Errors and Appeals in said opinion remanded the case to the (former) Supreme Court to determine questions of fact and that court in accordance with the remand filed an opinion July 15, 1948, holding that the record justified the finding that the appellant had been employed by an unlicensed manager, proprietor, operator or conductor as defined in the statute and therefore came within the portion of the statute held constitutional in the decision of the Court of Errors and Appeals.

An appeal was then taken by appellant from this decision to the Court of Errors and Appeals. While this appeal was

pending, the Court System of New Jersey was reorganized, and the (new) Supreme Court of New Jersey [1] took over all cases pending before the Court of Errors and Appeals.

On January 24, 1949, the (new) Supreme Court of New Jersey handed down its decision and judgment. It affirmed the second decision and findings of fact of the (former) Supreme Court (63 Atl. (2d) 535; —— N.J.L. —— not officially reported). Subsequently, a petition for re-hearing was filed and denied by the (new) Supreme Court on February 14, 1949, without opinion.

Appellant now appeals from the latest decision and judgment of the (new) Supreme Court of New Jersey. He bases his appeal on 28 U.S.C. 1257(2) on the ground that the validity of a State statute was drawn into question as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States and the decision was in favor of the validity of the State statute. The latest decision did not decide the constitutional question. An examination of the decision discloses that only a question of fact was determined and the constitutional question was not considered. In fact the court refused to pass upon the constitutional question and stated on the last page of its opinion (63 Atl. (2d) 535, at page 538).

> "We have no occasion to review the determination of the Court of Errors and Appeals, supra, that the in-

[1] Under the new Constitution in the State of New Jersey, the court system of New Jersey was changed while this case was pending on the second appeal to the Court of Errors and Appeals. That part of the Constitution which established the new court system became effective September 15, 1948. The name of the New Jersey Court of Errors and Appeals was changed to the Supreme Court of New Jersey. The name of the New Jersey Supreme Court was changed to the Superior Court. The Supreme Courts will be distinguished by the term "former" Supreme Court which existed prior to the adoption of the Constitution and is the one to which the writ of certiorari was taken; that term (new) Supreme Court will be used to designate the Supreme Court which was established by the new Constitution and is now the court of last resort, instead of the Court of Errors and Appeals.

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volved portion of the statute is both severable and constitutional."

Two questions therefore arise in this matter. First, is there a Federal question raised in view of the fact that the latest decision is only one of fact and the only decision based upon the constitutional objection of appellant is that handed down by the (former) Supreme Court (135 N.J.L. 255, 51 Atl. (2d) 250) which was in his favor; and second, is there a substantial Federal question involved.

A. Is There a Federal Question?

The only objection as to constitutionality was raised in the Reasons for Reversal filed (R. pp. 3-4) in the (former) New Jersey Supreme Court on review by writ of certiorari of the board's order of suspension. It is directed to that portion of Section 45:6-7(h) of the Revised Statutes of New Jersey with respect to the leasing of equipment for dental purposes. This part of the statute was held unconstitutional in the first decision of the (former) New Jersey Supreme Court, reported in 135 N.J.L. 255, 51 Atl. (2d) 250. This portion of the decision has not been expressly overruled by the highest court of this State. It still stands and as a result the contention of appellant is affirmed and sustained. The Court of Errors and Appeals in its decision, reversing this first decision of the (former) New Jersey Supreme Court, reported in 137 N.J.L. 161, 59 Atl. (2d) 231, was not concerned with that portion of the statute decided in that court but directed its opinion only to that portion which prohibited a licensed dentist from being employed by an unlicensed manager, proprietor, operator or conductor as defined in Section 45:6-19 of the Revised Statutes of New Jersey. The appellant did not challenge this portion of the statute in the lower tribunal. He now has no right to raise that question on this appeal. This court on appeal will not review a question

which was not raised in the lower State tribunal. *Chicago B. & Q. R. Co.* v. *Railroad Commission*, 35 S. Ct. 450; 237 U. S. 220; *Bullen* v. *Wisconsin*, 36 S. Ct. 473, 240 U. S. 625.

Since the only objection as to constitutionality raised by appellant in the lower tribunal was to that portion of the statute declared to be unconstitutional by the (former) New Jersey Supreme Court, and this objection was sustained, appellant therefore has no right under 28 U. S. C. 1257, subdivision 2, to appeal to this Court. The only remedy by appeal under 28 U. S. C. 1257(2) is where the decision is against the appellant and in favor of the validity of the statute. Such was not the result in this case. The appellant recognized this defect at the time he took this appeal and attempted to remedy it by filing a petition for re-hearing in the (new) Supreme Court of New Jersey, raising constitutional questions. This petition, however, was denied on February 14, 1949, without opinion.

The appellee therefore urges upon this Court the fact that no jurisdiction exists under 28 U. S. C. 1257 (2) as contended by appellant. The only objection raised by appellant as to constitutionality was decided in his favor. The court then decided the statute was severable and the severed portion constitutional. Severability is a State question. *Guinn* v. *U. S.*, 35 S. Ct. 926, 238 U. S. 347, 366; *Myers* v. *Anderson*, 35 S. Ct. 932, 238 U. S. 368, 380; *Mayflower Farms* v. *Ten Eyck*, 56 S. Ct. 457, 297 U. S. 266. Appellant did not object to the portion declared by the Court of Errors and Appeals as constitutional. The only portion to which he objected as unconstitutional being decided in his favor, he cannot appeal from such a judgment.

B. Is There a Substantial Federal Question Raised?

The appellant now raises the unconstitutionality of that portion of R. S. 45:6-7(h) which reads as follows:

> "Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfac-

tion that the licensee: * * * (h) has been employed by an unlicensed manager, proprietor, operator or conductor as defined in Section 45:6-19 of this title * * *."

In spite of the fact that the constitutionality of this portion of the statutory provision was not disputed in the State courts, and should not now be raised, the appellee still contends that there is no substantial basis for objection to even this quoted portion of the statute. The (new) Supreme Court of New Jersey held that the record was sufficient to show that the appellant came within the above quoted portion of the statute and sustained the suspension of his license by the State Board of Registration and Examination in Dentistry of New Jersey. This question of fact was decided in the second opinion of the (former) Supreme Court on certiorari and sustained by the (new) Supreme Court of New Jersey. The latest decision of the (new) Supreme Court of New Jersey, not officially reported, is printed in 63 Atl. (2d) 535. Findings of fact, it has been held, are binding on writs of error to a State court. *Noble* v. *Mitchell*, 17 S. Ct. 110, 164 U. S. 367; *Christman* v. *Miller*, 25 S. Ct. 468, 197 U. S. 313; *Standard Oil* v. *Brown*, 30 S. Ct. 669, 218 U. S. 78.

Since the highest court of the State of New Jersey has found that the facts are within the statute, the single question for determination is whether said portion of the statute is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The appellee contends that a mere examination of the statute itself discloses that it is not repugnant and that consequently a substantial Federal question has not been raised by appellant.

The United States Supreme Court on a number of occasions has held that a State, in providing for the general welfare of its people, may prescribe all such regulations as in its judgment will secure or tend to secure them against

the consequences of ignorance and incapacity, as well as of deception and fraud, and as a means to this end may impose qualifications for those who wish to practice a profession. *Dent* v. *West Virginia*, 9 S. Ct. 231, 129 U. S. 114; *Crane* v. *Johnson*, 37 S. Ct. 176, 242 U. S. 339; *Hawker* v. *New York*, 18 S. Ct. 573, 170 U. S. 189; *Reetz* v. *Michigan*, 23 S. Ct. 190, 188 U. S. 505; *Semler* v. *Oregon*, 55 S. Ct. 570, 294 U. S. 608; *Graves* v. *Minn.* 47 S. Ct. 122, 272 U. S. 425; *Watson* v. *Md.* 30 S. Ct. 644, 218 U. S. 173; *Collins* v. *Texas*, 32 S. Ct. 286, 233 U. S. 288.

Since it is within the power of a State in the exercise of its police power to provide qualifications of skill, learning and character for those who wish to be licensed to practice a profession, it is also a concomitant of such power that the State may impose conditions which require the continuance of such skill, learning and character. That portion of the statute in question which relates to the employment of licensed dentists by an unlicensed manager, proprietor, operator or conductor of a dental office is directed to the character of the licensed dentist. It is designed to prevent the practice of dentistry by unlicensed persons through the medium of unscrupulous and unethical licensees. An unlicensed person cannot practice a profession directly and certainly he should not be permitted to practice indirectly. Any person who attempts by subterfuge and evasion to weaken a statute which is for the public health and welfare of the citizens, or to evade its terms, has not the requisite moral character necessary for a person practicing a profession so closely allied to the health and welfare of the citizens as dentistry.

Regulations respecting the pursuit of a profession are of very frequent occurrence and what such regulations shall be and as to what particular professions they shall apply are questions for the State to determine. Unless the

regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass. *Williams* v. *Arkansas,* 30 S. Ct. 493, 217 U. S. 79.

In the case of *State Board of Dental Examiners* v. *Miller,* 90 Col. 193, 8 Pac. (2d) 699, a dental board revoked the license of dentists for unprofessional and dishonorable conduct and gross violation of their professional duties upon the ground they had accepted employment and practiced dentistry under a corporation which was not licensed; had knowingly aided and abetted a corporation in practicing dentistry and had conducted the office under their own names for the purpose of concealing the fact that the corporation had an interest in and partial or entire control and management of the dental office. The highest court of the State affirmed the action of the Dental Board and held that the statute was not void for uncertainty, that the practice of dentistry through the medium of a corporation was sufficient to revoke the license and that the bartering of a license by a dentist to a corporation was against public policy.

An appeal was taken to the United States Supreme Court and in a per curiam opinion, the Colorado court was sustained for lack of a Federal question in *Miller* v. *State Board of Dental Examiners,* 53 S. Ct. 6, 287 U. S. 563.

Similar statutes have also been held constitutional in the following cases: *Dr. Bloom, Dentist* v. *Cruise,* 53 S. Ct. 320, 288 U. S. 588, 259 N.Y. 358, 182 N.E. 16. Appeal to the United States Supreme Court dismissed for want of substantial Federal question. *People* v. *Painless Parker,* 275 Pac. 928, 5 Col. 304. Petition for certiorari denied, 50

S. Ct. 25, 280 U. S. 566. *Winslow* v. *Kansas State Board of Dental Examiners et al*, 223 Pac. 308, 115 Kansas 450. *People* v. *Carroll*, 274 Mich. 451, 264 N.W. 861.

The Appellant relies upon the case of *Liggett* v. *Baldridge*, 49 S. Ct. 57, 287 U. S. 105. The court in that case construed a Pennsylvania statute which prohibited ownership of drug stores or interest in corporations, partnerships or associations owning such stores by other than licensed pharmacists. It held that such a statute was invalid as denying due process of law under the Fourteenth Amendment. This case is not pertinent. The court in the *Baldridge* case held the plaintiff corporation was conducting an ordinary business and that the mere operation and ownership of a drug store can have no real or substantial relation to public health. Such is not the case here. The appellant is engaged in and assumed to be practicing the profession of dentistry. It is closely allied to and directly affects the health of the public. The services rendered are personal and call for knowledge of a high degree. To separate this knowledge from the power of control is an evil the occurrence of which was attempted to be prevented by the legislation in question. The applicable principles of law where restrictions are placed upon private business and where regulations are as to matters affecting the public health, like the practice of dentistry, are greatly different. The principle in the *Liggett* case is not applicable here. Furthermore, in the case of *John M. Daniel* v. *Family Security Life Insurance Co.* decided February 28, 1949 and contained in 14 L.W. 4226, this court commented upon the *Liggett* v. *Baldridge* case, *supra*, and held that the Liggett case was concerned with ownership of drug stores which might have no connection with the pharmaceutical branch and restricted in its opinion the application of the Liggett

case to a private business, rather than to a profession. As a result the Liggett case appears to be limited in its application and is not applicable to a licensed professional dentist.

The appellant also places reliance upon the case of *State* v. *Brown*, 37 Wash. 97, 79 Pac. 635, which holds that the State could not require the owner of a dental parlor to be a licensed dentist. It is significant to note that the case was decided in 1905 and in 1919 the same court held in *State* v. *Merchants Protective Corp.*, 105 Wash. 12, 177 Pac. 694, that a corporation could not legally practice law. The *Brown* case appears to be an exception to the general rule. In fact the case of *People* v. *Carroll* 274 Mich. 451, 264 N. W. 861, *supra*, which involved a statute requiring the owner of a dental office to be licensed, criticizes this case and held that the principle for which it stood was not applicable. The criticism pointed out in the *People* v. *Carroll* case is pertinent here.

The act regulating the practice of dentistry and acts of similar nature are not passed to promote the personal ends of individuals but as salutary enactments in the exercise of the police power of the State to legislate for the safety, health and welfare of the people. This end cannot be attained if the act in question is weakened or defeated by subterfuge or circumvented by devious methods.

For these reasons this court should decline to take jurisdiction in this cause.

2. Motion To Dismiss or Affirm

Appellee respectfully submits this statement showing there is no Federal question involved and consequently a lack of jurisdiction; further the question of the constitutionality of that part of R.S. 45:6-7(h) involved in this cause is so unsubstantial as not to need further argument.

WHEREFORE, appellee respectfully moves the court to dismiss the appeal in this cause or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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